No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

—v.—

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, NATIONAL NETWORK OF RUNAWAY AND YOUTH SERVICES, NATIONAL YOUTH ADVOCATE PROGRAM, AND AMERICAN YOUTH WORK CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, NATIONAL NETWORK OF RUNAWAY AND YOUTH SERVICES, NATIONAL YOUTH ADVOCATE PROGRAM, AND AMERICAN YOUTH WORK CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE[1]

The Amici who have joined in submitting this brief are linked by their special concern for children and their extensive

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1. This brief is being filed with the consent of both parties. Copies of the consent letters are on file with the Clerk of the Court.

experience in working with troubled youth. It is the hope of Amici that their insights into the unique nature of childhood and the attributes of children will be of assistance to the Court in resolving the difficult issues raised in this case.

The Child Welfare League of America is an association of over 450 leading child welfare agencies in the United States and Canada and 1,200 affiliates in twenty seven state associations, devoted to improving services for deprived, neglected, and abused children. Child Welfare League includes in its membership both public and voluntary, as well as both religious and non-sectarian agencies.

The National Council on Crime and Delinquency is a non-profit corporation that conducts research, recommends national juvenile justice standards, and works with

correctional and juvenile court professionals and citizens' groups to improve the quality of the criminal and juvenile justice systems.

The Children's Defense Fund (CDF) is a national public charity that represents and advocates on behalf of low-income minority and handicapped children. CDF strives for preventive intervention before youth drop out of school, suffer family break-down or get into trouble. CDF also addresses the special needs of troubled youth in the child welfare, juvenile justice, and mental health systems.

The National Association of Social Workers (NASW), a non-profit professional association with over 100,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of

social work practice and to improving the quality of life through utilization of social work knowledge and skills.

The National Black Child Development Institute (NBCDI) is a non-profit organization dedicated to improving the quality of life for Black children and youth. NBCDI's network of affiliates provides services such as finding adoptive homes for Black children and providing tutoring and leadership training for youth, and its volunteers help educate their communities about national, state, and local issues facing Black youth.

The National Network of Runaway and Youth Services, Inc., is a membership organization of over 1000 community-based youth-serving agencies, which serves as a communication, information and public education exchange on issues affecting

youth, advocates on behalf of vulnerable youth and their families, and conducts research and demonstration projects.

The National Youth Advocate Program, Inc. (NYAP) is a private non-profit youth advocacy and direct-service organization, which is responsible for developing and providing a range of individualized, flexible and innovative community-based programs for very troubled and needy youth as an alternative to institutionalization. NYAP has had considerable success in working with older adolescents with very serious needs and behavior problems.

The American Youth Work Center, a Washington-based organization that promotes improvement of services to children at risk, holds national and international training conferences and prepares reports on issues relating to youth services.

SUMMARY OF ARGUMENT

Amici's lengthy experience in counseling and rehabilitating troubled youth compels the conclusion that no person should ever be executed for an offense committed while under the age of eighteen years.

Amici begin by demonstrating the unavoidability of the conclusion that the Eighth Amendment establishes safeguards against the execution of children. The hypothetical of a ten-year-old murderer is used to demonstrate that the execution of a young child would not serve any of the penological goals underlying the use of capital punishment.

Amici then draw on their knowledge of adolescents to demonstrate that the same factors that render capital punishment unconstitutional for very young children

render it equally improper for all children below the age of eighteen. This discussion of the indefensibility of distinctions between sub-classes of children also draws on this Court's decisions in the field of juvenile rights, showing that the constitutional analysis established in these decisions does not tolerate an artificial demarcation between age-groups of children with respect to the imposition of capital punishment. The analysis of the indivisibility of the class of children concludes by showing that, even assuming arguendo that viable distinctions could be drawn between sub-classes of children, certainly the mechanisms that are used to transfer juveniles to adult court could not possibly serve that classification function.

Amici then call on their knowledge of

youthful offenders to show that even extremely violent youth are capable of rehabilitation when provided with appropriate services. It would not only be senseless, but fundamentally inhumane, to extinguish the lives of young people who could grow into productive and responsible members of society.

Finally, Amici show that the trend both in the United States and in the civilized world is decidedly against execution of persons under eighteen. To their shame, several states in this country still allow the execution of persons under eighteen, even when the evolving standards of decency throughout the world prohibit such executions.

ARGUMENT

I.

The Eighth Amendment Self-Evidently Prohibits the Execution of Children, and There Is No Constitutionally Viable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

A. The Eighth Amendment Clearly Precludes The Execution Of Children

During oral argument in Eddings v. Oklahoma, 455 U.S. 104 (1982), the State of Oklahoma conceded that the Eighth Amendment would not tolerate the imposition of a sentence of death upon a ten-year old. Transcript of Oral Argument, Eddings v. Oklahoma, supra, at page 28. This was conceded, notwithstanding the fact that the Oklahoma death penalty statute then and now does permit sentences of death for children of any age. See Okla. Stat. Ann. tit. 21, §§ 701.9(A), 701.10 - 701.12 (West 1983).

It is useful, however, to use the hypothetical posited by the Oklahoma

Attorney General -- the execution of a ten year old[2] -- to examine the precise nature of the constitutional imperatives concerning capital punishment for children.

If Petitioner were ten years old, there is little doubt that this Court would determine that his death sentence was prohibited by the Eighth Amendment. Such a case would make glaringly apparent the conclusion (which we will later demonstrate is equally true for older juveniles as

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2. The scenario discussed, the execution of a ten-year-old, is, unfortunately, not a purely speculative one. There have, in fact, been two ten-year-olds who have been executed in this country: James Arcene, A Cherokee Indian child who was hanged in Arkansas in 1885; and a Black child, whose name was not preserved in the records, who was hanged in Louisiana in 1855. Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen, 36 Okla. L. Rev. 613, 620 (1983).

well) that execution of a child would not contribute measurably to either of the "two principal social purposes" of capital punishment: "deterrence of capital crimes by prospective offenders" and "retribution." Gregg v. Georgia, 428 U.S. 153, 183 (1976)(plurality opinion).

This Court concluded in Gregg, supra, that "the death penalty undoubtedly is a significant deterrent" for many criminals. 428 U.S. at 185-86. When this Court spoke in Gregg of the quintessential type of murderer who might be deterred by capital punishment -- the "murder[er] for hire" who engages in a "cold calculus ... preced[ing] the decision to act," id. at 186, the Court presumably envisioned a perpetrator who was a sophisticated adult. With respect to those murderers and other adult murderers, it seems quite clear that the expansion of

the range of the death-eligible population to include ten-year-olds would not contribute even marginally to the goal of deterring adults from committing capital crimes.

Thus, the only population that could even conceivably be deterred by the inclusion of ten-year-olds in the death-eligible population would be other children in the same age range. But, in fact, the execution of a ten-year-old would not deter other young children from homicide, for such children do not have the ability to make rational judgments about their behavior. Ruled by their feelings, extraordinarily dependent upon their parents for protection and guidance and survival, and emotionally bound to their families, young children's "judgments" are the products of family dynamics and emotion, rather than the considered assessment of alternative

courses of behavior. Thus, a ten-year-old would be likely to kill someone (or at least to attempt it) if the homicide seemed necessary to the aid and comfort of his family or if it seemed that the family would condone or approve it. The threat of death would no more deter such a child than it would "those [adults] who act in passion for whom the threat of death has little or no deterrent effect." Gregg v. Georgia, supra, 428 U.S. at 185.

Similarly, the execution of a ten-year-old would not satisfy society's need for retribution. Ten-year-olds do not yet have the capacity to function as moral beings, able to evaluate their behavior in light of socially accepted values. They do not yet know the standards for appropriate behavior within the society in which they live, and thus cannot evaluate the approp-

riateness of their own behavior. Instead, ten-year-olds are profoundly dependent upon their parents and their family to define for them the boundaries of the appropriate. For that reason, condemnation of ten-year-olds makes no contribution to society's need for retribution.

As this Court has stated, "retribution as a justification for [the death penalty] ... very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). Most recently, the Court observed that "the critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison v. Arizona, 55 U.S.L.W. 4496, 4501 (U.S., April 21, 1987). The ultimate sanction of death is reserved for those who engage in

acts of "intentional wrongdoing" (Enmund, supra, at 800) and "purposeful ... criminal conduct" (Tison, supra, at 4501): those individuals who intentionally kill or who "knowingly engag[e] in criminal activities known to carry a grave risk of death." Id. at 4502. But ten-year-olds lack the independent ability to know the moral implications of their behavior, and thus cannot form the "highly culpable mental state[s]" (id. at 4502) that warrant the retributive imposition of the death penalty.

Finally, the execution of a ten-year-old is not warranted by the penological justification of incapacitation. The need for incapacitation arises only if the likelihood that an offender will kill again is so great that imprisonment will not suffice to protect other people. See

generally Gregg v. Georgia, 428 U.S. at 183, n.28. It is unthinkable that such a need could exist with respect to a ten-year-old. Such a child is hardly more than a hint of what he or she will become as an adult. The potential to grow into a morally responsible, productive adult is unlimited in such a child. With positive support and education, a ten-year-old child can as fully leave behind the emotions and behaviors that led that child to kill as the butterfly leaves behind the cocoon. There simply cannot be a legitimate need to incapacitate a ten-year-old child with the finality of death. As observed by the Supreme Court of Kentucky with respect to a child older than ten:

> [I]ncorrigibility is inconsistent with youth; ... it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

For these reasons, the critical question presented by petitioner's case is not whether the Eighth Amendment forbids the execution of children below a certain age. As the hypothetical of the ten-year-old amply illustrates, the Eighth Amendment surely shelters children below a certain age from the ultimate punishment. The crucial question in this case is what that age should be. As the following sections will show, the prior decisions of this Court and the practical realities of the juvenile justice system dictate that the line must be drawn at the age of eighteen.

B. There Is No Viable Basis For Distinguishing Among Juveniles For Purposes Of Administration Of The Death Penalty

The quandary of line-drawing among minors is, of course a dilemma that this

Court has faced on prior occasions. In numerous cases, in numerous factual contexts, this Court has consistently sounded a single, overarching theme: that children -- simply by virtue of their status of minors -- can be deprived of the rights and privileges of adults. This Court's decisions sanctioning legal disabilities for minors treat juveniles as a coherent class, and establish the age of majority as the demarcation between the period of childhood and the period of adulthood.

In Ginsberg v. New York, 390 U.S. 629 (1968), this Court considered whether a state statute prohibiting the sale of sexually explicit (albeit non-pornographic) material to all persons under the age of seventeen violates the First Amendment. Without distinguishing between mature and

immature minors, this Court held that a state can constitutionally treat the general class of minors differently from the way it treats the general class of adults. In a passage that has frequently been reiterated by this Court, Justice Stewart expressed the generalization that children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Id. at 649-650 (Stewart, J., concurring) (footnotes omitted).

In Parham v. J.R., 442 U.S. 584 (1979), this Court once again applied a generalization about children, this time in the context of involuntary civil commitment of children by their parents. In rejecting the claim that the commitment statute unconstitutionally discriminated against persons on the basis of their young age,

the Court observed that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." Id. at 603.

In this Court's most recent ruling on the rights of juveniles accused of crime, Schall v. Martin, 467 U.S. 253, 265 (1984), the Court again treated childhood as a unique status, that differentiates all children from all adults. Rejecting a challenge to the constitutionality of a statute that authorizes preventive detention for juveniles, the Court observed that juveniles do not possess the qualities of self-restraint and maturity that are the basic presuppositions upon which the right to pre-trial liberty rests. Id. at 265 (preventive detention can be imposed in order to protect "'the juvenile from his own folly'").

It is instructive to consider the context in which this Court has previously decided questions of juvenile law. Typically, the question that is presented is whether a certain juvenile, or class of juveniles, is sufficiently mature or sophisticated to be treated as an adult and freed of a statutory or administrative restriction that affects all young people. This Court has repeatedly rejected such attempts to draw distinctions between subgroups of minors, and instead has relied on generalizations about the unique nature of childhood and the universal characteristics of children, to treat minors as a single coherent class. See, e.g., Schall v. Martin, supra, 467 U.S. at 265 ("[c]hildren, by definition, are not assumed to have the capacity to care for themselves"); Prince v. Massachusetts, 321 U.S. 158, 168

(1944)(upholding the state's right to restrict a minor's employment opportunities because "[t]he state's authority over children's activities is broader than over like actions of adults").

The series of decisions addressing the privacy rights of a young woman to an abortion constitute the only factual context in which this Court has tolerated any line-drawing on the basis of the relative maturity or immaturity of individual youths. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981). However, the Court has permitted line-drawing only in order to avoid irrevocable harm. In Bellotti v. Baird, the Court recognized that "considering her probable education, employment skills,

financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." 443 U.S. at 642. Accordingly, the Court struck down a parental veto statute that would have imposed the "grave and indelible" consequences of "unwanted motherhood" upon mature minors who were capable of rationally considering the alternatives. Id.

Unlike the prior cases involving juvenile rights, where an individual juvenile (or a litigant acting on behalf of the juvenile) sought to divide artificially the general class of children into subclasses of mature and immature children for the sake of expanding mature minors' rights, here it is the State that is asking the Court to engage in such artificial line-drawing. The State asserts, in effect, that certain juveniles are suffici-

ently mature and sophisticated so as to fall outside the general category of youth and be subjected to the perquisites (here, the penalties) of adulthood. Significantly, the State has not offered any proposals for the dividing line between juveniles, that could serve as an alternative to the age-eighteen threshold proposed by amici. Nor has the State, through its legislature, even set statutory parameters to define the range of ages of children that could be eligible for capital punishment. Notwithstanding the Oklahoma Attorney General's disavowal of executions of ten-year-olds in the oral argument in Eddings v. Oklahoma, supra, the State is here defending its right to maintain a statute that permits the executions of ten-year-olds and even younger children. In essence, the State is seeking carte blanche to define maturity on

a case-by-case basis, without any statutory or constitutional restrictions or guidance concerning the decisions that will be made in the individual cases.

The case-by-case decisionmaking urged by the State cannot be squared with this Court's prior decisions in the area of juvenile rights. There can be no justification for employing a "ratchet" analysis that forbids case-by-case decisionmaking for the sake of expanding juvenile rights while employing that very same form of decisionmaking for the sake of extinguishing the greatest of all rights, the right to life. This case certainly does not fall within the single exception which this Court, in the abortion cases, carved in its general approach of treating all minors as a coherent class. Unlike the abortion cases, there are no "grave" or "indelible"

consequences to anyone -- not the State and certainly not the minor -- in failing to permit minors to be executed.

In addition to demonstrating the impermissibility of sub-dividing the general class of minors, this Court's prior caselaw on juvenile rights has yet further relevance to the present case. The qualities that this Court has associated with the period of childhood -- and that the Court has relied upon in denying rights to minors -- are the very attributes that would render the death penalty irrational and unjustifiable when applied to children. In Eddings v. Oklahoma, supra, the Court observed that minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage" and that adolescents "generally are less mature and responsible than

adults." 455 U.S. at 115-16. In Eddings, this Court furthermore stated, quoting from the report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

> '[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'

455 U.S. at 115 n.11. In Haley v. Ohio, 332 U.S. 596, 599 (1948), this Court referred to the "period of great instability which the crisis of adolescence produces." In Bellotti v. Baird, supra, notwithstanding the distinction drawn between mature and immature minors, the Court spoke in broad terms of the general class of minors as "often lack[ing] the

experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." 443 U.S. at 635.

The experience of Amici in working with adolescents amply supports these observations about the period of adolescence. The stage of developmental growth known as adolescence frequently is characterized by: impulsivity and inability to exercise self-restraint; inability to consider the future consequences of one's actions; the false confidence generated by feelings of omnipotence; inadequate judgment, in part because of the lack of sufficient life experience to provide a perspective or broader context for evaluating events; susceptibility to the influence of peers, partly because of the lack of sufficient confidence in one's own identity; and finally, boundless potential

for change, since the personality that the individual will have as an adult is still in the process of being formed.

These typical attributes of adolescence have an obvious bearing on the assessment of whether executions of juveniles could possibly serve the penological goals of capital punishment. Because many adolescents act impulsively without a "cold calculus ... preced[ing] the decision to act," Gregg v. Georgia, supra, 428 U.S. at 186, they are no more subject to deterrence than are their ten-year-old counterparts. The retribution rationale is equally inapplicable: adolescents "'deserve less punishment because [they] may have less capacity to control their conduct and to think in long-range terms than adults.'" Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11 (quoting Twentieth Century Fund Task

Force on Sentencing Policy Toward Young Offenders). The retribution rationale also is less applicable to juveniles because "'youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" Id. Finally, because adolescents are still malleable and may develop very different personalities and values as they gain experience and perspective, it is impossible to conclude definitively that a particular youth must be executed in order to incapacitate him or her from committing future crimes. Indeed, the social scientific literature and the experience of amici demonstrate that many violent adolescents can be rehabilitated. See pp.43-52 infra.

The foregoing discussion of the attri-

butes of adolescence does not suggest, of course, that every single adolescent necessarily shares the qualities which typify the period of adolescence. Quite obviously, individual adolescents vary markedly in their degree of maturity, self-control, and judgment. The attainment of adult levels of maturity and judgment may occur at very different ages, depending upon the individual youth's prior experiences, education, and support network of parents and friends.

What the Court is being asked in this case is whether there is a single age of childhood, at which it can be said that adolescents no longer suffer from the impulsivity and other qualities of adolescence that render the use of capital punishment unjustifiable. The experience of amici demonstrates that there is no "magic age" at which all adolescents will

necessarily attain the maturity and sophistication that are associated with adulthood. There simply is no viable basis for establishing categorical demarcations among age-groups of adolescents.

The only principled distinction between children and adults in the context of capital punishment is the very same distinction that this Court has repeatedly used in defining the rights of minors: the age of majority. For this reason, the Court should rule that children below the age of eighteen[3] cannot be executed.

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3. Although the states vary somewhat in the age designated as the "age of majority", virtually all states, including Oklahoma, employ age eighteen as the age of majority. See Okla. Stat. Ann. tit. 15, § 13 (West 1983); see generally M. Guggenheim & A. Sussman, The Rights of Young People 187, 290-91 (2d ed. 1985)(listing the age of majority for every state).

C. Even Assuming Arguendo That There Were A Principled Basis For Distinguishing Among Juveniles In The Capital Sentencing Context, Currently Existing Mechanisms For Transferring Juveniles To Adult Court Do Not Provide A Viable Basis For Such Principled Decision-making

At the present time, the only factor that separates juveniles eligible for capital punishment in Oklahoma from those who are exempt from the ultimate sanction is the process of transfer to adult court. In Oklahoma, as in virtually all states, juveniles can be transferred to adult court for prosecution as adults. See generally S. Davis, Rights of Juveniles: The Juvenile Justice System, § 4.1 (1986). Since all juveniles who are prosecuted in adult court in Oklahoma are eligible for the death penalty, regardless of their age, the process of transfer to adult court in effect serves as the process for defining the death-eligible class of juveniles.

The question, then, is whether the statutory mechanism for transfer to adult court is a viable mechanism for "legislative[ly] defin[ing] . . . [and] circumscrib[ing] the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 878 (1983).

The hypothetical of the ten-year-old murderer is once again useful in demonstrating the precise workings of the system. If transfer were a rational mechanism for defining the death-eligible class, then it would necessarily filter this youth out of the class of death-eligible youths transferred to adult court. In fact, however, depending upon the facts of the case, this ten-year-old very well might end up in adult court. Many youths are transferred to adult court because their rehabilitative needs are so great

that the youths are unlikely to complete the regimen of rehabilitative services during the limited number of years that a child can remain within a facility for juvenile delinquents. See S. Davis, supra, § 4.3, at 4-16. Thus, the most irrational of results is produced: the rehabilitative potential of a youth does not exempt a youth from eligibility for the death penalty and, instead, serves as the predicate for placing him or her at risk of receiving a death sentence.

The explanation for this irrational course of events is readily apparent when one examines the precise nature of the transfer standards used in Oklahoma (as well as other states), and compares them with the criteria which are constitutionally necessary for identifying the class of persons eligible for capital punishment.

Unlike the "determination of [moral] culpability required in capital cases," Tison v. Arizona, supra, 55 U.S.L.W. at 4501, transfer statutes are not primarily concerned with the moral culpability of the offender. Nor do transfer statutes purport to assess whether juveniles possess the maturity and sophistication of adults. Rather, transfer statutes have the central goal of identifying and transferring to adult court those "youthful offenders who cannot benefit from the specialized guidance and treatment [i.e., "the special features and programs"] contemplated by the [juvenile court] system." Breed v. Jones, 421 U.S. 519, 535 (1975); see generally S. Davis, supra, § 4.3, at 4-15 ("In making a waiver determination the juvenile court judge is called upon to decide whether the child is amenable to the treatment and

rehabilitation afforded by the juvenile processes."). Accordingly, a youth like the ten-year-old could be transferred to adult court, simply because there are no suitable local juvenile programs, even though this child possesses neither the moral culpability demanded for the imposition of a death sentence nor the maturity and sophistication of an adult.

The actual effect of these principles is illustrated by examining the Oklahoma standards for transfer. Although the Oklahoma transfer statute's roster of factors to consider includes the ability to appreciate wrongfulness, Okla. Stat. Ann. tit. 10, § 1112(b)(3) (West. 1983), the Oklahoma Court of Criminal Appeals has expressly declared that maturity is not a prerequisite for transfer to adult court. In Sherfield v. State, 511 P.2d 598, 601

(Okla. Crim. App. 1973), the court stated:

> The contention that before there can be a proper certification [to adult court] there must be a showing that the juvenile had advanced emotional maturity and a behavior pattern greater than his chronological age is, in our view, without foundation in the provisions of the Juvenile Act.

The state court held that neither the certification statute nor the Constitution calls for a demonstration that the juvenile "know[s] right from wrong as would a nineteen or twenty-one year old person." Id. at 602. Accord, Matter of Smith, 548 P.2d 647, 648 (Okla. Crim. App. 1976) ("reiterat[ing] that the maturity and age of the juvenile are but one consideration" and that a finding of maturity is not an indispensable predicate for transfer).

The Oklahoma Court of Criminal Appeals' decision in Matter of Sanders, 564 P.2d 273 (Okla. Crim. App. 1977), approving

the transfer of two youths to adult court, is the quintessential case of the transfer system's classification of rehabilitative potential as an aggravating, rather than mitigating, factor for purposes of the transfer determination. In Sanders, two seventeen-year-old youths were transferred to adult court in part because they needed more years of treatment than could be provided in a juvenile court system that must discharge youths when they attain the age of majority. Thus, the potential for rehabilitation, rather than preventing transfer, served as the predicate for the transfer. The additional reason for the transfer in Sanders -- the absence of local rehabilitative facilities with adequate security measures for serious felons -- demonstrates that the transfer system is often more concerned with the suitability

of local programs than with the offender's moral culpability, lack of potential for rehabilitation, or even emotional maturity.

Finally, it has been the experience of amici that the transfer system does not even serve as a reliable mechanism for sifting out the most dangerous offenders or the most heinous crimes. Rather, transfer is routinely used as a vehicle for ridding the juvenile court of the most obstreperous recidivists who have exhausted the resources and patience of juvenile court staff.

Thus, the transfer system does not ask any of the questions necessary for rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, supra, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The use of the

transfer process as a mechanism for defining the death-eligible population of children would truly render the death penalty "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, supra, 408 U.S. at 309 (Stewart, J., concurring).

II.

The Execution of Children Would Violate The "Standards of Decency" That Have Evolved In This Country and Abroad

A. Execution of A Child Is Fundamentally Inconsistent with National Views, As Manifested In Policies For Treatment Of Troubled Youth

This Court has repeatedly recognized that the punishment of death is unique in its finality and irrevocability. E.g., Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). By its very nature, a sentence of death constitutes society's rejection of

the possibility of "rehabilitation of the convict." Furman v. Georgia, supra, 408 U.S. at 306 (Stewart, J., concurring).

Amici are united in their belief that the irrevocable sentence of death must not be imposed upon children, who, simply by virtue of their tender age and their still-evolving personalities, are inherently capable of being rehabilitated over time.

The juvenile justice system in this country was founded upon two central philosophical premises: (i) that children who commit crimes should be helped rather than punished, because these children lack the maturity and sense of responsibility of adults; and (ii) that children, because of their youth and malleability, are more likely subjects for successful intervention than older and, presumably, more hardened offenders. See In re Gault, 387 U.S. 1,

15-16 (1967); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 2-3, 9 (1967).

The mere fact that a youth has been transferred to adult court does not necessarily signify that s/he is no longer malleable or capable of benefitting from some form of rehabilitation. As explained earlier, the need for a lengthy period of rehabilitation may even be the reason for the transfer.

The commission of a homicide also does not necessarily render a youth beyond redemption. The available data on juveniles convicted of homicide indicates that carefully structured correctional and community-based programs can result in the rehabilitation of these serious offenders. A two-year follow-up of homicide offenders

paroled from the California Youth Authority (CYA) in 1984 showed that 76.7 % of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9 %. California Youth Authority, Offender-Based Institutional Tracking System (1987). A study of chronic and violent juvenile offenders in Ohio similarly found that approximately 60 % of youths who were charged with murder in juvenile court were not subsequently re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).

The experience of Amici in working with young people confirms these social science findings on the malleability and inherent rehabilitative potential of even violent youth. The populations served by

Amici range from extremely young, neglected children to violent delinquents on the verge of adulthood. The vast majority of these children currently suffer, have in the past suffered, or will in the future suffer from the "failure of family, school, and the social system," which lead to "youth crime." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978) (quoted in Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11). Amici have repeatedly found that these children can be taught to adopt society's norms, precisely because juvenile crimes grow out of the "[a]dolescent[']s ... vulnerab[ility], ... impulsivi[ty], and ... [lack of] self-discipline[]." Id.

An examination of a few actual case histories provides the clearest possible

illustration of the rehabilitative potential that even extremely violent youth possess:

(i) A girl whom we will call Dora (real name withheld to preserve confidentiality), grew up in Washington D.C., raised by parents who were drug sellers and addicts. Starting when Dora was eight years old, her parents used her as a courier in their drug trade. When Dora was fourteen years old, she killed her boyfriend by shooting him in the back. When Dora was seventeen, she committed an armed robbery, in which she pistol-whipped the victim. At the age of eighteen, Dora committed another homicide, again of a boyfriend. Dora was removed from her community, and sent to a residential facility in California. She graduated successfully from the program and has remained crime-free for the past seven years. Today she is twenty-six years old, still living in California, living with a man who is gainfully employed as the manager of a small store, and raising two children.

(ii) Kevin, a sixteen-year-old who resided in the Roxbury section of Boston, committed a series of robberies while armed with a knife. During one of these armed robberies in 1974, he gratuitously stabbed a senior citizen. Kevin was convicted in juvenile court of armed robbery and assault and battery by means of a dangerous weapon, and then, pursuant to the procedure that prevailed in

Massachusetts at the time, the Commonwealth attempted to transfer him to adult court for re-prosecution as an adult. The transfer was prevented by this Court's intervening decision in Breed v. Jones, 421 U.S. 519 (1975). Kevin was sent to a community-based non-residential treatment program for juveniles. The program provided intensive special educational services appropriate for his mild mental retardation, and provided counseling to deal with his low self-esteem, inadequate home life, and negative peer group. Kevin successfully graduated from the program after one year. Since that time, he has remained crime-free.

(iii) Michael, a fifteen-year-old boy who lived in Washington, D.C., killed his step-mother with an axe, dismembered her body and put it in the dust-bin. He was convicted in juvenile court in 1964, and sentenced to the juvenile detention facility for an indeterminate period. He remained in the facility for 4 years and was released when he was nineteen years old. While he had been incarcerated in the facility, he received a variety of rehabilitative services and, most significantly, established a relationship of trust with a recreation counselor, with whom he maintained contact even after leaving the facility. Upon returning to the community, Michael finished school and then obtained employment in an air conditioning installation company. He subsequently married, settled in a working class apartment project, and raised a child. As of his last contact

with the recreation counselor, which occurred in 1980, he had remained crime-free and was still employed and happily married.

(iv) Edward Harrison (real name being used with consent) was seventeen years old when he committed a felony murder, shooting the victim with a sawed-off shot-gun during the commission of a robbery. The crime took place in Washington D.C. in March of 1960. Eddie was charged as an adult with first-degree murder, convicted, and sentenced to death. While Eddie was on death row awaiting execution, having waived his right to appeal, it was discovered that his trial attorney had been practicing law without a license. Accordingly, Eddie's conviction was reversed and he was re-tried. He was once again convicted, but because the death penalty was no longer in effect, Eddie was sentenced to life imprisonment. The conviction was again overturned on appeal, Eddie was again re-tried and again sentenced to life imprisonment. However, during the eight-and-a-half years that Eddie had spent in prison pending appeals and re-trials, he had become involved in arranging rehabilitative programs for himself and other inmates. Through the support of prison staff and a local judge, Eddie was released pending appeal and became involved in designing rehabilitative programs for delinquent youth. His conviction was eventually upheld on appeal, but, as a result of the progress he had achieved, his sentence was commuted by President Nixon. Since Mr.

Harrison's release from prison in 1968, he has devoted his life to programs for youth. Now 44 years old, he is the executive director of a Baltimore-based program for pre-trial diversion for delinquent youth, which Mr. Harrison himself created and initiated with the aid of a federal grant, and which now is an established Maryland state program. Mr. Harrison also is the vice-chairman of the Maryland Juvenile Justice Advisory Council, and has testified before Congress on issues relating to youth and delinquency.

There are of course numerous other success stories that could be cited. The four that have been presented, were selected because they each involved a murder or, in the case of Kevin, a lethal act that fortuitously did not end in a death. The same remarkable transformation that occurred in each of these cases has been replicated in numerous other cases of equally serious crimes as well as less serious crimes. The successes are usually due to the quality and creativity of the rehabilitative facility. For example, the

House of Umoja in Philadelphia has experienced remarkable successes in reforming members of violent youth gangs, for more than a decade. See R. Woodson, A Summons to Life: Mediating Structures and the Prevention of Youth Crime (1981); Fattah, "Call and Catalytic Response: The House of Umoja," in Violent Juvenile Offenders: An Anthology 231 (1984). The Glen Mills School in Concordville, Pennsylvania, has also had remarkable successes in reforming extremely violent delinquents, through a combination of superb academic, vocational training, and athletic programs, as well as a variety of creative measures designed to build self-esteem. For example:

> Richard, a fifteen-year-old who was convicted of first-degree felony-murder in the West Virginia juvenile court, was placed in the Glen Mills School in March of 1984. During the period of almost three years that Richard remained at Glen Mills, he received special education classes and vocational training in a

> variety of marketable skills, and he participated in student government and varsity sports. During his final seven months at the school, Richard was placed in a day-time job in a local furniture store, where he could apply the wood-working skills he had learned at the school. Richard was released in January of 1987 and is now living with his sister in Ohio and complying with all of the conditions of his probation. He is presently looking for employment in the furniture construction trade, and, in the interim, is working in a restaurant.

Developments in corrections policies in recent years provide the promise of continued, and possibly even increased, successes in the reformation of violent youth. In January of 1980, the Federal Office of Juvenile Justice and Delinquency Intervention initiated a nation-wide research and development effort to identify the most effective intervention strategies for rehabilitating violent juvenile offenders. See Fagan, Rudman & Hartstone, "Intervening with Violent Juvenile Offenders: A Community Reintegration

Model," in Violent Juvenile Offenders: An Anthology, supra at 207-09. The preliminary results of this national research effort indicate that recidivism can be significantly reduced through a regimen of a short period of confinement in a small secure facility with intensive staff support, followed by the provision of carefully planned services upon the youth's re-entry into the community. See Krisberg, "Preventing and Controlling Violent Youth Crime: The State of the Art," in I. Schwartz, Violent Youth Crime: What Do We Know About It and What Can Be Done About It (1987). See also P. Greenwood & F. Zimring, One More Chance: The Pursuit of Promising Intervention Strategies for Chronic Juvenile Offenders (1985).

The available evidence indicates that all adolescents, regardless of whether they

committed very violent offenses or less serious crimes, are capable of rehabilitation. It is precisely for this reason that rehabilitation has been the central guiding theme of the juvenile justice system. The mere fact that a youth has been transferred to adult court does not eliminate the malleability of the childhood personality or obliterate the youth's potential for rehabilitation. National standards of civilized and humane justice, and the national understanding of adolescent behavior, demand that that promise of rehabilitation not be forever foreclosed through the irrevocable act of execution.

B. Execution of A Child Is Fundamentally Inconsistent With National Views, As Manifested In Objective Indicia Such as Legislative Pronouncements And Jury Verdicts

As this Court has repeatedly recognized, the judgments of legislators, as

reflected in the statutes they enact, and the views of jurors, as evidenced by the verdicts they return, are relevant to the assessment of the "evolving standards of decency" that lie at the core of the Eighth Amendment's proscription against cruel and unusual punishment. See, e.g., Enmund v. Florida, supra, 458 U.S. at 789-96; Coker v. Georgia, 433 U.S. 584, 593-97 (1977); Gregg v. Georgia, supra, 428 U.S. at 179-182. Both the judgments of legislators and the views of jurors support the conclusion that children should be exempt from the ultimate punishment of execution.

In twenty-six jurisdictions in the United States today, no child under the age of eighteen may be executed. This includes: fourteen states and the District of Columbia, which prohibit capital punishment of adults and juveniles alike as

unconscionable; and eleven states which, although tolerating capital punishment for adults, exempt children under the age of eighteen from the imposition of the death penalty.[4] In an additional two states, no child under the age of seventeen may be put to death.[5] Thus, in only twenty-three

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4. The eleven states which set the minimum age for eligibility for capital punishment at age eighteen, are: California (Cal. Penal Code § 190.5 (1985)); Colorado (Col. Rev. Stat. § 16-11-103(1)(a) (1986)); Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (1985)); Illinois (Ill. Ann. Stat. Ch. 38, § 9-1(b) (Smith-Hurd Supp. 1985)); Maryland (adopted on April 13, 1987; see Washington Post (April 14, 1987), at A1, A7); Nebraska (Neb. Rev. Stat. § 28-105.01 (1985)); New Jersey (N.J. Stat. Ann. § 2C:11-3f (West Supp. 1986)); New Mexico (N.M. Stat. Ann. § 31-18-18 (1979)); Ohio (Ohio Rev. Code Ann. § 2929.02(A) (1982)); Oregon (Ore. Rev. Stat. § 161.620 (1985)); and Tennessee (Tenn. Code Ann. § 37-1-134(a)(1) (1984)).

5. See Ga. Code Ann. § 17-9-3 (1982); Tex. Penal Code Ann. § 8.07(d)(Vernon Supp. 1987).

jurisdictions, would it be possible to take the life of someone for an act committed while he or she was sixteen-years-old or younger.

Even more significant to the assessment of the evolution of national standards of decency is the fact that recent state legislative proceedings demonstrate a clear trend of increasing recognition of the unconscionability of executing children. Nebraska and Ohio established prohibitions against the execution of children under the age of eighteen in 1982. See Neb. Rev. Stat. § 28-105.01 (1982); Ohio Rev. Code Ann. § 2929.02(A) (Page 1982). Colorado and Oregon followed suit in 1985, and New Jersey in 1986. See Colo. Rev. Stat. § 16-11-103(1)(a) (1986); Ore. Rev. Stat. § 161-615 (1985); N.J. Stat. Ann. § 2C:11-3f (West Supp. 1986). On April 13, 1987, the

Maryland legislature joined the growing trend by also adopting age eighteen as the minimum age for capital punishment. Washington Post (April 14, 1987), at A1, A7. Thus, it seems clear that the minority of states permitting execution of a child will, in coming years, be an ever-decreasing minority.

Model legislation and criminal justice standards also support a ban on executions of children below the age of eighteen. The Model Penal Code, which the Court considered in gauging the constitutionality of capital punishment in Gregg v. Georgia, supra, 428 U.S. at 191, 193, recommends that children below the age of eighteen be deemed ineligible for capital punishment. See American Law Institute, Model Penal Code § 210.6 (Official Draft 1980). The National Commission on the Reform of

Criminal Law similarly called for a prohibition against execution of children below the age of eighteen. National Commission on the Reform of Criminal Law, Final Report on the New Federal Code § 3603 (1971). The American Bar Association, which has never before taken a formal position on any aspect of capital punishment, adopted a resolution in 1983 opposing "the imposition of capital punishment upon any person for any offense committed while under the age of eighteen." American Bar Association Report No. 117A (approved in August, 1983).

As this Court has recognized, juries are "a significant objective index of contemporary values." Gregg, supra, 428 U.S. at 181; accord, Enmund v. Florida, supra, 458 U.S. at 795. In the present decade, juries have returned verdicts of

death only rarely when the defendant was a minor. See Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 384 (1986)(as of December, 1983, children under age eighteen constituted only 2.9 % of the death row population of 1,289 persons). Moreover, as the imposition of death sentences for adults has continued to grow, the rate of death sentences for minors has decreased. Id. (from December 1983 to July 1986, adult population of death row increased by 42 % (from 1,250 to 1,770), while juvenile population decreased by 16 % (from thirty-eight to thirty-two); juveniles accounted for only 1 % of the approximately 700 death sentences imposed from December, 1983, to March, 1986).

Thus, the objective criteria of contemporary values in this country clearly

militate against the imposition of the death penalty upon children under the age of eighteen.

C. Execution of Children Has Been Condemned And Rejected By Most Of The Civilized World

In deciding whether imposition of the death penalty constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment, this Court also has looked to the "'climate of international opinion.'" Enmund v. Florida, supra, 458 U.S. at 796 n.22; Coker v. Georgia, supra, 433 U.S. at 596 n.10. The overwhelming consensus of modern opinion in the Western World supports Amici's view that state-sanctioned executions of children are cruel, inhumane, and contrary to the rehabilitative and protective attitudes which the law otherwise manifests towards children.

Three major international human rights treaties expressly prohibit the death penalty for children below the age of eighteen. See International Covenant on Civil and Political Rights, Article 6(5), in Multilateral Treaties Deposited With the Secretary General of the United Nations, at 124, U.N. Doc. ST/LEG/Ser. E/3 (1985); American Convention on Human Rights, Article 4(5), in Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63; Geneva Convention for the Protection of Civilians in Time of War, Article 68; see generally Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 Cin. L. Rev. 655 (1983).

Over eighty nations, including the

vast majority of western European nations, have either abolished the death penalty altogether or have forbidden it for children and adolescents. Id. at 666 n.44. Even among the eighty-one nations that do permit executions of children, there were only two juveniles who were actually put to death during the decade from 1973-82. Id. at 666-67 n.44. Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under eighteen years of age." See United Nations Economic and Social Council (UNESCO), Report of the Secretary General on Capital Punishment at 10, UN. Doc. E/5242 (1973).

Thus, it is clear that most of the civilized world has recognized the important developmental differences which distinguish adolescent children from

adults, and has rejected the death penalty for all children below the age of eighteen.

CONCLUSION

Amici respectfully submit that a society bounded by an injunction not to inflict cruel and inhuman punishment, as measured by evolving standards of decency, should recognize as a categorical rule of law that no person may be executed for an offense committed while under the age of eighteen years. Amici urge this Court to reverse the judgment of the Court of Criminal Appeals of the State of Oklahoma insofar as it upheld the imposition of petitioner's sentence of death.

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